IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 260

NORTH CAROLINA NATURAL GAS CORPORATION,
Petitioner,

v.

McJUNKIN CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

EUGENE GEESSMAN
1730 K Street, N. W.
Washington 6, D. C.

DICKSON PHILLIPS
Chapel Hill, North Carolina

DONALD W. McCOY
Fayetteville, North Carolina

Counsel for Petitioner

July 17, 1962.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX

	Page
Citation to opinion below	1
Jurisdiction	2
Questions presented	2
Statement of the case	2
History of this litigation	2
Relevant facts	4
Reasons for granting the writ	10
I. May a federal court in a diversity suit measure damages for an anticipatory breach of contract without regard to the state substantive law as to the measurement of such damages?	10
II. May a federal court, in directing a verdict against the party not having the burden of proof, decline to view the evidence in a light most favorable to that party and thereby deprive the party of the right to a jury trial?	14
Conclusion	17
Appendix A (opinion of Court of Appeals on rehearing)	1a
Appendix B (extract from original opinion of Court of Appeals)	21a

CITATIONS

CASES:

Bryant v. Southern Co., 192 N.C. 607	12
Callan v. Andrews, 48 F. 2d 118 (C.A. 2)	12
Commissioner v. Scottish-American Inv. Co., 323 U.S. 119	15
Continental Ore Co. v. Union Carbide Co., 370 U.S. — (June 25, 1962)	14
Erie R. Co. v. Tompkins, 304 U.S. 64	10, 11, 12, 13, 14, 17

	Page
Galloway v. United States, 319 U.S. 372	15
Henderson v. Pierson, 201 F. 2d 740 (C.A. 10)	16
Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487	11, 13
Perkins v. Langdon, 237 N.C. 159	12
Reliance Cooperage Co. v. Treat, 195 F. 2d 977 (C.A. 8)	12
Roshin v. Horst, 178 U.S. 1	12
Tennant v. Peoria & P.U.R. Co., 321 U.S. 29	14
Tillis v. Calvine Cotton Mills, 251 N.C. 359	12
Transcontinental & Western Air, Inc. v. Koppal, 345 U.S. 653	11
Victorson v. Albert M. Green Hosiery Mills, 202 F. 2d 717 (C.A. 3)	12
Wm. J. Lemp Brewing Co. v. Ems Brewing Co., 164 F. 2d 290 (C.A. 7)	12

MISCELLANEOUS:

Beale, Damages upon Repudiation of a Contract, 17 Yale L.J. 443 (1908)	12
Beale, What Law Governs the Validity of a Contract, 23 Harv. L. Rev. 260 (1910)	12
2 Beale, Conflict of Laws (1935)	12
5 Corbin, Contracts (1950)	12
James, Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict, 47 Va. L. Rev. 218 (1961)	15
Restatement, Contracts	12
2 Sedgwick, Damages (1912)	12
3 Williston, Sales (1948)	12
Note, 7 N.C. Law Rev. 462 (1929)	12
Note, 107 U. Pa. Law Rev. 217 (1958)	15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No.

NORTH CAROLINA NATURAL GAS CORPORATION,
Petitioner,

v.

McJUNKIN CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

North Carolina Natural Gas Corporation, petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered on March 19, 1962, in this proceeding.

CITATION TO OPINION BELOW

The original opinion of the Court of Appeals, dated April 10, 1961, is not reported. The opinion of that court on rehearing, dated March 19, 1962, is reported at 300 F. 2d 794. These opinions appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals entered on rehearing is dated March 19, 1962. This judgment was entered following a hearing on a petition for rehearing of a judgment and opinion previously entered on June 12, 1961. On June 11, 1962, Mr. Chief Justice Warren signed an order extending the time for filing this petition for a writ of certiorari to and including July 17, 1962.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a federal court, in a diversity suit for anticipatory breach of a contract, may formulate and apply its own standards as to interpreting the contract and measuring damages, or whether *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, requires such court to discover and apply the applicable state law as to such matters.

2. Whether a federal court may, in directing a verdict in favor of the party having the burden of proof, substitute its own inferences and conclusions instead of viewing the evidence in a light most favorable to the opposing party to determine if a jury could rationally have found in the opposing party's favor.

STATEMENT OF THE CASE

HISTORY OF THIS LITIGATION

The respondent McJunkin Corporation brought this breach of contract action against the petitioner North Carolina Natural Gas Corporation in the United States District Court for the Eastern District of North Carolina. Jurisdiction was grounded upon the parties' diversity of citizenship.

The complaint alleged an anticipatory breach of a contract for the purchase of steel pipe and damages resulting therefrom. North Carolina by answer denied all allegations, including a denial of the existence of such a contract.

The case came on for trial before a jury. At the conclusion of McJunkin's evidence, North Carolina moved orally for a directed verdict; the motion was denied. North Carolina then presented its evidence. When both parties had rested, North Carolina moved (1) for a directed verdict, (2) for certain instructions to be given to the jury, and (3) for the submission of the issues to the jury. All these motions were denied.

McJunkin then moved for a directed verdict in its favor, which motion was granted over North Carolina's objection. Thereupon the jury, as directed, returned a verdict awarding judgment to McJunkin in the sum of $123,493.88. North Carolina's subsequent motion (1) to set aside the verdict and enter a judgment n.o.v. in its favor, or, alternatively, (2) for a new trial, was denied.

The Court of Appeals for the Fourth Circuit originally affirmed the judgment in McJunkin's favor on June 12, 1961. A rehearing was granted on North Carolina's motion, the petition alleging that the court had misapplied the substantive law of damages. After further briefing and oral argument on the rehearing, the Court of Appeals issued a new opinion on March 19, 1962, and reaffirmed the judgment in McJunkin's favor. 300 F. 2d 794. As to the problem of damages, which had formed the basis of the rehearing, the Court of Appeals concluded (p. 20a, *infra*):

> "Since we decide this question of amount of discount on the basis of insufficiency of evidence,

it is not necessary to decide what measure of damages rule is applicable, or whether the law of North Carolina or West Virginia applies."

RELEVANT FACTS

At the trial, the following relevant facts were established:

1. McJunkin is a West Virginia corporation, with principal offices in Charleston, West Virginia. It is engaged in the business of selling steel pipe products as a discount or commission broker, purchasing such products from the steel mills at a discount. North Carolina is a Delaware corporation with executive offices in Fayetteville, North Carolina. It is engaged in the business of natural gas transmissions and distribution in eastern North Carolina.

2. From the Fall of 1956 through the Summer of 1958, North Carolina was attempting to procure financing for construction of a pipe line system in North Carolina, having acquired the necessary federal and state authorization. Looking toward the time when such financing might be secured, North Carolina sought during this period to line up the necessary steel pipe for the pipe line. The main problem in that connection was the acquisition of certain sizes of high-grade thin wall pipe, known as "X-grade."

3. North Carolina entered into negotiations with McJunkin, during the course of which McJunkin was made aware of North Carolina's special pipe requirements and its concurrent efforts to obtain the necessary financing. Various oral and written communications were exchanged between agents of the two corporations over a period of approximately one year with regard to the supplying of North Carolina's pipe requirements:

(a) **March 29, 1957.** Following preliminary meetings and correspondence, North Carolina's engineer wrote to the vice-president of North Carolina that he felt McJunkin could meet North Carolina's requirements. This letter included specifications for pipe, quantities, sizes, terms, delivery dates and the statement that the cost would be mill price at time of shipment plus freight from the nearest competitive mill. Tr. 25.

(b) **April 9, 1957.** North Carolina's vice-president wrote McJunkin that its proposal "relative to the pipe for the North Carolina project to be shipped to his [the engineer's] specifications and construction date requirements is hereby accepted." Pl. Ex. 2.

(c) **April 12, 1957.** North Carolina's vice-president wrote the company's engineer, notifying him of the "acceptance" of McJunkin's proposal. Tr. 132.

(d) **June 11, 1957.** North Carolina's engineer was advised by the vice-president that McJunkin would be unable to supply the 16" pipe included in the former proposal and that such pipe would have to be obtained elsewhere. Tr. 132.

(e) **July 3, 1957.** McJunkin sent North Carolina a complete and formal quotation (known as No. P-2469) of all prices on its pipes, including specifications, unit prices, terms, delivery dates and quantities. Size 16" pipe was included, and the quantities for several other sizes were different from those in the original March 29 proposal. Pl. Ex. 1. These quotations, however, were subject to home office approval. And they resulted from McJunkin's position that the previous communications had not sufficiently "spelled out" McJunkin's commitments. North Carolina agreed that it would be appropriate to put down in writing "what

you feel you can offer, so that we will be completely clear on it, and we will follow up with a detailed order."

(f) **July 11, 1957.** North Carolina's vice-president wrote McJunkin "cancelling" requirements for 16" pipe and adding: "Please accept this letter as your purchase order for our pipe requirements as outlined hereafter and in general accordance with your quotation Number P-2469." There then followed the same figures as appeared in the July 3 quotations, specifying delivery dates and quantities. The last sentence read: "Will you please accept this order." Pl. Ex. 2.

(g) **July 15, 1957.** McJunkin placed six purchase orders for pipe, referred to as being for North Carolina's requirements, with Jones & Laughlin Steel Co. Jones & Laughlin acknowledged and accepted these orders on August 5, 1957. Tr. 35-36.

(h) **July 16, 1957.** A McJunkin agent notified North Carolina's engineer by telephone that McJunkin could not supply the "X-grade" pipe included in both the March 29 and July 11 letters. Tr. 93-95.

(i) **July 17, 1957.** North Carolina's vice-president wrote McJunkin "cancelling" its order of 10" and 12" pipe because McJunkin was unable to place this order with the mills. A repetition of the 16" pipe cancellation was also included. Pl. Ex. 3.

(j) **August 5, 1957.** McJunkin wrote North Carolina to thank it for the July 11 order "accepting our quotation P-2469 for your pipe requirements." The letter also stated that the two items mentioned in the July 17 communication had been deleted. Pl. Ex. 4.

(k) **September 24, 1957.** McJunkin wrote Jones & Laughlin indicating that it had placed orders with

Jones & Laughlin for the North Carolina pipe requirements and stating, "At the present time delivery on this project depends on funds being made available." Pl. Ex. 17; Tr. 34.

(l) **October 9, 1957.** McJunkin wrote Jones & Laughlin that it had been informed by North Carolina that the latter would not want any pipe prior to January 1, 1958. Tr. 38. This letter reflected the fact that in the Fall of 1957 it had become known to all parties that financing the construction of North Carolina's pipe system could not be accomplished on the basis of the plans then in effect. A complete change of the system was required, including major changes in pipe requirements, and that change was not completed until early in 1958. Such changes were communicated to McJunkin prior to May 27, 1958. Tr. 148-153.

(m) **May 27, 1958.** North Carolina's vice-president wrote McJunkin "cancelling" the pipe ordered on July 11, 1957, and stating further that this was to cancel "the entire remainder of the order." Pl. Ex. 9. On the same day, McJunkin wrote North Carolina's engineer that McJunkin now understood North Carolina's "revised pipe requirements" were as set forth therein, adding:

> "In the event the North Carolina Natural Gas Corporation completes financing and proceeds with construction this year (1958), and on the basis of a firm non-cancellable order, we agree to furnish these pipe requirements at the competitive delivered prices to jobsite, based on domestic shipment of API pipe. . . .
>
> "This offer is subject to acceptance by May 29, 1958." D. Ex. 1; Tr. 54, 135.

(n) **May 29, 1958.** Agents of McJunkin visited North Carolina's vice-president; they discussed the contents of McJunkin's May 27 letter and the possibility of further discount concession to North Carolina if it would place an order for all its pipe requirements with McJunkin immediately. Tr. 212-214.

(o) **June 3, 1958.** McJunkin wired North Carolina of its non-acquiescence in the "cancellation" of May 27, 1958. Pl. Ex. 10; Tr. 33. Thereafter various exchanges between the companies reiterated North Carolina's "cancellation" and McJunkin's intention to hold North Carolina to its "order." McJunkin declined to submit any quotations for North Carolina's new pipe requirements. Tr. 120.

4. North Carolina placed orders for its new pipe requirements with other suppliers. It received its new financing in mid-October, 1958, and proceeded immediately to order delivery of its pipe requirements as its construction project demanded. It received approximately 58% of its total pipe requirements prior to January 1, 1959, and the balance in 1959. Tr. 164-166, 212-213.

5. McJunkin stood to profit on any consummated sale of pipe to North Carolina ordered from producers at the rate of a 5% "functional discount" on shipments prior to January 1, 1959, and at a rate of a 3% "functional discount" on shipments on and after January 1, 1959. Tr. 62-63, 112, 163-164.

This suit was instituted on September 15, 1958, and trial commenced on October 20, 1960. On the basis of the foregoing facts, the Court of Appeals affirmed the directed verdict in McJunkin's favor and held:

(1) That McJunkin's quotation of July 3, 1957, North Carolina's letter of July 11, 1957, and McJunkin's communication of August 5, 1957, constituted the contract. The court thereby rejected North Carolina's claim that there was sufficient evidence to permit the jury to infer, alternatively, (a) that the parties had never entered into a contract because a precondition to North Carolina's "acceptance" of McJunkin's "offer" was the securing by North Carolina of its necessary financing, and the so-called revocation occurred before that event, or (b) that the contract was executory in nature, specifically conditioned on the right of the parties to cancel unilaterally at any time prior to North Carolina's financing or the actual commencement of pipe production.

(2) That the contract was breached by North Carolina in its letter dated May 27, 1958.

(3) That the damages were to be measured entirely on the basis of the 5% "functional discount" which McJunkin would have received on pipe shipments made prior to January 1, 1959. The court thereby rejected North Carolina's claim that the proper rule of damages for such an anticipatory breach of contract, where the actual time of performance is demonstrable by the time of trial, is the actual profit realizable at such time of performance; here there was proof that the actual time of performance depended upon the securing of financing by North Carolina; and upon the occurrence of that event North Carolina promptly secured 58% of its pipe prior to January 1, 1959, and the remainder during 1959. Hence, under North Carolina's theory, the jury could have found that 58% of McJunkin's damages were measurable at the 5% discount rate, and the remainder at the 3% rate.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals raises important and disturbing questions in the exercise of the diversity jurisdiction of the federal courts. May a federal court, in a breach of contract action, interpret the contract and measure damages without regard to the applicable state substantive law as to such matters? May such a court establish and apply a general federal law of contracts and damages in a suit between citizens of different states? And may a federal court deprive a defendant in a diversity suit of the right to a jury determination of disputed factual issues by the simple expedient of assuming the role of the jury and resolving all factual issues against the defendant?

These are significant questions that deserve plenary consideration by this Court. If the guiding rule of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, is to be respected and if the right to a jury trial of disputed facts is to be maintained in the federal courts, review of the decision below becomes not only appropriate but necessary.

I. May a Federal Court in a Diversity Suit Measure Damages for an Anticipatory Breach of Contract Without Regard to the State Substantive Law as to the Measurement of Such Damages?

The Court of Appeals below purported to determine "on the basis of insufficiency of evidence" that the sole measure of damages in this case was at the 5% discount rate. In so doing, however, the court expressly disavowed the necessity of deciding "what measure of damages rule is applicable, or whether the law of North Carolina or West Virginia applies." See p. 20a, *infra*. Instead, it established its own general rule—to wit, the measure of damages is "such as may reasonably be said to have been in the mutual contemplation of the

parties at the time of the execution of the contract." See p. 18a, *infra*. The court then determined from the evidence that the parties never contemplated that the 5% discount rate would ever be reduced to 3%.

Such a ruling raises a most serious question in the administration of the federal diversity jurisdiction. Since this Court's decision in *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, it has been clear that in diversity suits of this nature the appropriate state law "should determine the requirements of the cause of action, the interpretation of the contract and *the measure of damages to be applied*." *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653, 656-657 (emphasis added). As noted in *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 496, "It is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws." In other words, it is not within the competence of a federal court, in a diversity suit, to ignore the applicable state law as to measurement of damages for breach of contract or to fashion its own independent general rule. Nor can it do so as to matters of contract interpretation.

Yet the Court of Appeals has made and applied its own general standard of damage measurement in this diversity case. And it has expressly disregarded the necessity—imposed by the *Erie* doctrine—of discovering and applying the proper state law of damage measurement. Thus its conclusion that the petitioner failed to establish sufficient evidence to meet its own self-generated standard is both improper and valueless. The only relevant inquiry is whether petitioner presented sufficient evidence to permit a jury, under applicable state law requirements, to weigh the conflicting factors and to draw its conclusions as to the damages suffered

by the anticipatory breach of contract. That inquiry has yet to be made in this case.

Petitioner suggests that, since the so-called acceptance of the contract took place in North Carolina and since the pipes were to be delivered in North Carolina, the applicable law to be followed in interpreting the contract negotiations and in assessing the damages is that of North Carolina.[1] Had the court below, as was its duty under the *Erie* doctrine, made any effort to discover the North Carolina law as to the measurement of damages for anticipatory breach of contract and then assessed the facts in light of that law, it would have had to conclude that damages depend upon the best evidence available at trial time to show what the plaintiff's profits would have been in the normal course had performance actually taken place as contemplated.[2] Indeed, such is the law of West Virginia and of the overwhelming number of other jurisdictions and authorities that have dealt with this problem.[3]

---

[1] See Beale, *What Law Governs the Validity of a Contract*, 23 Harv. L. Rev. 260 (1910); 2 Beale, *Conflict of Laws* § 332.4 (1935); and see *Victorson* v. *Albert M. Green Hosiery Mills*, 202 F. 2d 717, 718, n. 2 (C.A. 3); *Wm. J. Lemp Brewing Co.* v. *Ems Brewing Co.*, 164 F. 2d 290, 293 (C.A. 7).

[2] *Bryant* v. *Southern Co.*, 192 N.C. 607; *Tillis* v. *Calvine Cotton Mills*, 251 N.C. 359. See also *Perkins* v. *Langdon*, 237 N.C. 159, 172-178; Note, 7 N.C. Law Rev. 462 (1929).

[3] "In other words, though the plaintiff sues at once for an anticipatory breach of the contract, his damages are to be assessed according to the cost of performance, not at the time of the breach, but at the time set for performance." Beale, *Damages upon Repudiation of a Contract*, 17 Yale L.J. 443, 448 (1908). See also 5 Corbin, *Contracts* § 1053 (1950); 3 Williston, *Sales* § 587 (Rev. ed. 1948); 2 Sedgwick, *Damages* § 636d (9th ed. 1912); Restatement, *Contracts* § 338, comment (a). See also *Roehm* v. *Horst*, 178 U.S. 1, 20; *Reliance Cooperage Corp.* v. *Treat*, 195 F. 2d 977 (C.A. 8); *Callan* v. *Andrews*, 48 F. 2d 118 (C.A. 2).

Applying that standard to this case reveals an evidentiary basis which would have required the submission to the jury of the question of what profits McJunkin would have earned had the contract been carried out. From the facts available at the time of trial, there was evidence from which the jury could have rationally concluded that McJunkin would have delivered only 58% of the pipe requirements during 1958, when the 5% rate was still in effect. And the jury could then have concluded that the remaining 42% would have been delivered—as the facts showed actually happened when petitioner had to secure pipe from other sources after January 1, 1959, when the 3% rate became effective. The total damages, under this theory, would have been materially less than the amount determined by the courts below.

The complete and acknowledged failure of the court below to determine the proper state law for measuring such damages and then to match the foregoing facts against that standard constitutes an abdication of the court's function under the *Erie* doctrine. See *Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487, 496. And it deprives petitioner of its right to a jury determination of this contested damage question in light of the proper state law. The same may be said as to the court's failure to treat the contract and breach questions in light of North Carolina law. A dangerous precedent has thus been created for ignoring the *Erie* doctrine. For that important reason, the invocation of this Court's certiorari jurisdiction is sought.

II. May a Federal Court, in Directing a Verdict Against the Party Not Having the Burden of Proof, Decline to View the Evidence in a Light Most Favorable to That Party and Thereby Deprive the Party of the Right to a Jury Trial?

An integral part of the failure of the court below to follow the commands of the *Erie* doctrine was its own injection into, and resolution of, two highly contested issues of fact: (1) Was there ever a contract between the parties and a breach thereof? (2) If there was a contract and a breach, what loss of profits was suffered by McJunkin? As to both of those issues the court below, as well as the District Court, found in favor of McJunkin without ever permitting the questions to go to the jury for resolution. And the court did so by formulating its own rules as to what constituted a contract, a breach thereof and the resultant damages. No mention was made of the North Carolina law on such matters. The Court's *Erie* function was disregarded.

It is elemental, of course, that it is beyond the function of either a federal trial judge or a federal appellate court to replace the jury in determining contested issues of fact. If the evidence at the trial fairly permits of different inferences and conclusions, only the jury can make the decisive determinations. As re-emphasized most recently in *Continental Ore Co.* v. *Union Carbide Corp.*, 370 U.S. — (June 25, 1962), where all the evidence does not point in one direction, it is for the jury to weigh the contradictory evidence and inferences and to draw the ultimate conclusions as to fact. See *Tennant* v. *Peoria & P.U.R. Co.*, 321 U.S. 29, 35. "The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desir-

able." *Commissioner v. Scottish-American Inv. Co.*, 323 U.S. 119, 124.

But in this case the courts below have entered into the arena of factual conflict with a vengeance. The very length of the opinion of the Court of Appeals stands as mute evidence of the extreme judicial intervention into matters reserved for the jury. That opinion might well reflect the considered opinion of a jury, had the case been submitted to it. Yet it cannot disguise the very real conflicts of fact which inhere in this trial record. The decision below is merely one view, one conclusion, which can be drawn from that record.

The court below, in sustaining a directed verdict in favor of the party having the burden of proving the determinative issues, reached the outer limits of the permissible area for the exercise of the power to take the case from the jury. The utmost of judicial restraint should be exercised in this context, viewing the evidence in a light most favorable to the opposing party. Indeed, to direct a verdict for the party having the burden of proof comes closest to infringement upon the Seventh Amendment's guarantee of jury trial rights in civil cases. Cf. *Galloway* v. *United States*, 319 U.S. 372, 395-396.[4] The evidence should thus have been viewed from the standpoint of whether the jury, had it believed petitioner's evidence, might rationally have found for the petitioner.

As to the question of the existence of a contract, there was substantial evidence that the parties never contemplated a completed contract until the financing of North Carolina's operations became secure. McJunkin

[4] See, generally, James, *Sufficiency of the Evidence and Jury-Control Devices Available Before Verdict*, 47 Va. L. Rev. 218, 226 (1961); Note, 107 U. Pa. L. Rev. 217, 219 (1958).

was made aware of these financing difficulties, made changes in the specifications as circumstances dictated, and informed its suppliers that delivery of the pipe depended upon funds being available to North Carolina. Even as late as May 27, 1958 (the date of the "cancellation" of the alleged contract), McJunkin was still seeking "a firm non-cancellable order" on the basis of North Carolina's "revised pipe requirements" in the event North Carolina "completes financing and proceeds with construction this year." D. Ex. 1; Tr. 54, 135.

Added to these facts was evidence that the custom of the trade permitted just such negotiations as here occurred to be considered as tentative until the resolution of a prime contingency, such as the procurement of necessary financing. Even so-called "cancellations" were considered part of the custom in the steel pipe business in such circumstances. Tr. 167. See *Henderson* v. *Pierson*, 201 F. 2d 740 (C.A. 10).

All of such evidence, admitted into the record, permitted an inference that in this context no firm contract was ever formulated, or that, if such a contract existed, it was by custom subject to unilateral cancellation. The fact that the court below felt that a different inference was required merely reflects the contested nature of the issue and the necessity for allowing the trier of facts—the jury—to draw the inference that it considers most reasonable. Additionally, of course, the court below made no effort to find or apply the North Carolina law of contract interpretation.

The same is true as to the issue of damages. Here again the evidence as to the losses actually suffered by McJunkin was a matter of irreconcilable dispute, compounded by the failure of the courts below to apply the proper state law as to the measurement of damages. As already indicated, evidence was available to permit

the jury, properly instructed, to find that had the alleged contract actually been consummated, at least 42% of McJunkin's profits would have been computed at the lower 3% discount rate. To ignore the possibility of such a conclusion, to insist upon the computation at the higher 5% rate for all lost profits, is to invade the function of the jury and to abuse the power to direct a verdict.

What the court below has done is to disregard the *Erie* doctrine as to both the contract and damage issues, to establish its own rules in those respects, and to measure the evidence in light of those rules. And it has compounded such errors by declining to view the evidence in a light most favorable to the party against whom the verdict was directed.

To preserve the historic function of the jury in the federal court system, and to guarantee the right of litigants to a jury determination of contested issues of fact, a review of the decision below is requisite.

CONCLUSION

For the foregoing reasons, a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit should issue.

Respectfully submitted,

EUGENE GRESSMAN
1730 K Street, N. W.
Washington 6, D. C.

DICKSON PHILLIPS
Chapel Hill, North Carolina

DONALD W. McCOY
Fayetteville, North Carolina

Counsel for Petitioner

July 17, 1962.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8308

McJUNKIN CORPORATION, *Appellee*,
versus
NORTH CAROLINA NATURAL GAS CORPORATION, *Appellant*.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, AT RALEIGH. ALBERT L. REEVES, DISTRICT JUDGE

(Argued April 10, 1961. Decided June 12, 1961.)
(Argued on rehearing January 8, 1962:
Order on rehearing March 19, 1962.)

Before HAYNSWORTH and BOREMAN, Circuit Judges, and HARRY E. WATKINS, District Judge.

Dickson Phillips (McCoy, Weaver & Wiggins, and Donald W. McCoy on brief) for Appellant, and John H. Anderson, Jr., and A. G. Stone (Willis Smith, Jr.; Smith, Leach, Anderson & Dorsett, and Blagg, Stone, Mauzy & Bowles on brief) for Appellee.

HARRY E. WATKINS, District Judge:

This is an action brought by plaintiff, McJunkin Corporation, to recover damages from defendant, North Caro-

lina Natural Gas Corporation, for breach of contract to purchase an order of steel pipe. At the conclusion of all the evidence before a jury, the court directed a verdict for the plaintiff in the amount of $123,493.88. The only question raised on this appeal is whether the trial court was justified under the law and evidence to direct such verdict. We think the directed verdict was proper and affirm the judgment.

There is little, if any, conflict in the material facts. The controversy arises over the legal effect to be given certain letters exchanged between the parties, which plaintiff contends amounted to a quotation by plaintiff, an unqualified purchase order by defendant based upon such quotation, certain deletions agreed to by the parties, and an unqualified acceptance by plaintiff of such purchase order as so revised. Defendant says that the contract sued on was not, as the trial court held, a complete and binding contract, enforceable by plaintiff as a matter of law, but that it was "conditional" and subject to unilateral cancellation.

On December 7, 1955, defendant was authorized to do business in North Carolina as a public service corporation, and needed money, gas and pipe. Banks and insurance companies would lend money, but required a showing of a guaranteed source of gas and pipe. In March, 1957, the Federal Power Commission authorized an allocation to defendant of forty million cubic feet of gas per day. Because of limited steel capacity and extraordinary customer demand, assured delivery of pipe was a major problem. Line pipe in diameters greater than 4 inches was especially difficult to obtain. Pipe is sold by weight and, for economic reasons, defendant insisted upon pipe of thinner wall thickness than was made by most mills.

Plaintiff does not manufacture pipe, but sells large quantities of pipe to natural gas companies, much of which is shipped in carload lots direct from the steel mill to the user. The established price is the mill price or manufacturer's price at date of shipment. The profit or func-

tional discount allowed plaintiff and other suppliers in 1957 and 1958 was 5 per cent of the price f.o.b. the mill. Industry and trade journals publish the prevailing prices currently. Because of the shortage of steel in 1957, plaintiff and other such companies selling pipe were placed on an allotment by the steel mills. For example, Jones & Laughlin Steel Company allotted a certain amount of steel to the plaintiff to sell and when that was sold, there was no more available.

R. A. Ransom, a consulting engineer, was employed to present defendant's case to the Federal Power Commission, to secure or recommend all materials for the pipe line, and to supervise the construction of the pipe line. Ransom knew that plaintiff had connections with manufacturers of pipe, and communicated with representatives of plaintiff to secure pipe. After considerable correspondence, Ransom met with plaintiff's sales manager, Sample, and Wehrle, its assistant to the president, on March 22, 1957, to discuss defendant's pipe requirements and plaintiff's ability to supply them. On March 29, Ransom wrote defendant's vice president, Kyle, stating that Biddison, president of the defendant, had instructed him (Ransom) to notify plaintiff that "we will purchase the pipe from or through them," that a purchase order "now appears to be in order," and that "shipping instructions will be furnished later." The letter stated that the cost to defendant would be the mill price at date of shipment, plus freight from the nearest competitive mill. The letter also listed the sizes and quantities of the pipe required.

Upon receipt of this letter, Kyle, on April 9, 1957, wrote plaintiff that its proposal to Ransom "relative to the pipe for the North Carolina project to be shipped to his specifications and construction date requirements is hereby accepted." On April 12, Kyle wrote Ransom, notifying him of the "acceptance" of plaintiff's proposal. Kyle, vice president of defendant, testified that he considered his letter

of April 9 and agreement for the purchase of its pipe requirements, and if there had been no revision thereof, he would have continued to consider the agreement in force and effect.

Plaintiff took the position that the letters were not in enough detail, and wanted its commitment "spelled out more exactly, * * * because at this particular time pipe was unavailable practically and we had to be definite exactly what requirements we were committed to." Ransom had told plaintiff to put down on the quotation "what you feel you can offer, so that we will be completely clear on it, and we will follow up with a detailed order." To "spell out" the agreement in more detail and to take care of certain changes in the quantities and size of pipe suggested by defendant, plaintiff on July 3, 1957, submitted its formal quotation No. P-2469, based on the latest information from Ransom, listing in detail quantities and description of pipe, and prices for each. However, the quotation provided as follows:

> "Prices shown on any quotation, or on any order or acceptance of order, are subject to governmental price regulations and to change, based on increase or decrease in manufacturer's price as of date of shipment."

This quotation was promptly accepted by defendant in a purchase order letter dated July 11, 1957, which reads as follows:

> "Please accept this letter as your purchase order for our pipe requirements, as outlined hereafter, and in general accordance with your quotation Number P-2469."

The purchase order specified in detail the quantity, description, price and shipping period for each size of pipe to be shipped between the dates October 15, 1957, to January 30, 1958, the larger transmission pipe to be shipped

first, and the smaller piper for distribution lines to be shipped later. While the quotation listed quantities of X-grades (10¾" and 12¾") of pipe, both parties understood and intended that defendant was to order these sizes, as well as the 16" pipe direct from the mill. Defendant's letter of July 17, 1957, eliminated the 10¾" and 12¾" sizes from the order, this being done by mutual agreement.

For some time, plaintiff had been spending much time and effort to locate the type of pipe needed by defendant, and immediately placed the order with Jones & Laughlin, a manufacturer of pipe. Just as soon as the mill acknowledged the order, plaintiff, by letter dated August 5, 1957, accepted defendant's purchase order of July 11, 1957, from which the X-grades of pipe had been deleted. The letter from Wehrle to Kyle, vice president of defendant, stated:

> "Thank you for your letter of July 11 accepting our quotation P-2469 for your pipe requirements on this project.
>
> "We have deleted the two items of transmission pipe in accordance with your letter of July 17. Our mill, Jones and Laughlin Steel Corporation, has entered these requirements in their mill schedules.
>
> "We certainly appreciate this order and if we can be of any other service, please call us."

Plaintiff had been notified by the mill that "once orders are in for this job, we will not have any pipe for you on other jobs. We look to you to sell this, and this is going to wipe you off our books during this crowded period of time." Plaintiff elected to sell its quota to defendant, although it could have delivered to someone else. At that time, all of plaintiff's mills were allocating material, and at that time plaintiff was sold out with other mills.

This letter of August 5, 1957, was the culmination of a binding and subsisting contract between the parties, not

ambiguous, conditional or indefinite in any manner, and binding on the defendant to purchase and the plaintiff to furnish the pipe dedicated and committed to plaintiff out of the limited quantities of pipe allocated to it by the mill in 1957. Plaintiff was thereby forced to pass up the opportunity to sell to other customers during that period, as the contract exhausted its allotment during the last quarter of 1957.

Plaintiff's formal and detailed quotation of July 3, 1957, defendant's purchase order letter of July 11, 1957, amended on July 17, 1957, by mutual consent to eliminate the "X-grades" and, finally, plaintiff's letter of acceptance, dated August 5, 1957, constituted the contract. Many other circumstances, including defendant's earlier purchase agreement letter of April 9, 1957, the scarcity of pipe at the time, and the allotment of pipe by the mill, all tend to corroborate the actions and motives of the parties, as shown by these four documents. They show the eagerness of defendant to obtain a definite commitment from a responsible supplier, and how such commitment was finally obtained. Kyle, the only officer of defendant to testify, was asked: "When you received the letter from Mr. Wehrle of August 5, and from that time on, you knew that McJunkin Corporation had committed itself to furnish your company the pipe referred to in your letter of July 11 upon the terms of your letter of July 11? A. Yes." Elsewhere, Kyle testified that he had "obtained a commitment for the pipe," and that he wished it "tied down" to his satisfaction. He also testified that "everything was set and accomplished for the delivery of the pipe, except the time."

The early negotiations with plaintiff were based on "the plan of the Company (defendant) to complete its financing in the very near future" and upon its expectation that the project would "go forward rapidly, with construction to start" in the fall of 1957. However, late in 1957, after the contract of purchase had been completely executed, de-

fendant encountered delays in its financing. It was about September 24, 1957, when plaintiff first learned about this. Delivery was to begin October 15. At defendant's request, plaintiff agreed to postpone delivery to November 15, 1957, then to January 1, 1958, and through meetings, telephone conversations and correspondence, the parties mutually agreed to delay the time for deliveries for an indefinite period under the contract, until defendant's money should become available. Plaintiff kept Jones & Laughlin advised as to the developments. At all times after acceptance of defendant's purchase order, plaintiff was "able, ready and willing" to sell and deliver the pipe under its contract and commitment.

While plaintiff was still waiting to be informed of the success of defendant's financing, and for defendant to set a date for delivery, Kyle, without notice or explanation of any character, sent a brief cancellation letter, dated May 27, 1958, the first sentence of which stated: "This letter will constitute cancellation of the line pipe ordered from you in our letter of July 11, 1957."

While defendant was seeking delay in the date of delivery, and while the date for delivery remained indefinite, there was a radical change in the pipe market. Within a few weeks in the latter part of 1957, all sizes of pipe became readily available. Foreign pipe invaded the market. Commission brokers of all type, including a former director of the defendant, were selling pipe and were willing to pass on to the buyer nearly all of their profit. One witness for the defendant, Sholar, testified that during the latter part of 1957, (before the cancellation date), he, a supplier, talked to the defendant about passing on to defendant 4 per cent of his 5 per cent discount, and that later he sold considerable pipe to defendant on this basis. He did not remember when, with reference to the cancellation date of May 27, 1958, that he made a definite proposition to pass on this discount and get the order for pipe on that basis. In the

summer of 1958, defendant committed itself to purchase three-quarters of a million dollars worth of pipe from other companies and as of September, 1958, had commitments aggregating several million dollars worth of pipe from other companies. Defendant completed its financing in October, 1958. Kyle, the vice president of defendant, said he did not know how much his company saved by cancelling the order with plaintiff and buying elsewhere. He testified that before writing the cancellation letter, he consulted counsel and the president of his company. He did not deny, but could not remember, that the lower prices were a motive for cancellation. The record strongly indicates that defendant's action was a calculated risk, and that it took into account the large savings realized by shifting its purchases to the lower priced foreign pipe.

The cancellation letter was received by plaintiff on May 29, 1958, and by letter and telegram, plaintiff notified defendant that it would be held accountable for the breach of contract. On June 13, plaintiff wrote defendant as follows:

> "On October 9, 1957 we wrote you delaying delivery until 1958 on your order of July 3, 1957. This was delayed at your request due to your financing not having been completed.
>
> "We now understand that the insurance companies have made commitments and that your financing will be completed early to mid-August. In order to meet the construction requirements after funds are available, it will be necessary for you to advise us as to desired date of delivery, the order in which the different sizes of pipe are required, and any other relevant information."

Defendant replied on June 18, 1958, as follows:

> "This will acknowledge receipt of your letter of June 13, 1958, requesting the date of delivery of our

pipe requirements. We refer you to our letter of May 27, 1958, in which all of the remaining pipe on order with your Company for North Carolina Natural Gas Corporation was cancelled."

to which plaintiff immediately replied:

"We are holding your company fully responsible for its obligations under that agreement."

This action was instituted September 15, 1958. The mill price on pipe was increased August 4, 1958. By letter dated September 11, 1958, defendant, through Ransom, asked plaintiff for quotations on defendant's requirements, although the requirements listed were much less than set forth in the purchase order of July 11, 1957. On October 6, 1958, plaintiff expressed a willingness to negotiate and settle the pending litigation on the basis of defendant's reduced requirements. In that letter, plaintiff stated "that it must be definitely understood that McJunkin Corporation stands on its existing contract and that it will be necessary to process any settlement of the pending litigation, however arrived at, through our local attorney, * * *" There was no reply to this letter.

There is an additional circumstance upon which defendant relies. A few days before May 27, 1958, plaintiff found itself able until May 29, 1958, to supply defendant with X-grades of pipe (10 3/4", 12 3/4" and 16" sizes). An advance in steel prices seemed imminent. The date to secure this additional pipe was about to expire, and on May 27, 1958, which was the exact date of cancellation, plaintiff wrote a letter to Ransom, which listed quantities of pipe from 3 1/2 inches to 16 inches in diameter, which plaintiff offered to sell defendant, the quantities based on defendant's recent downward revision of requirements. Defendant urges that this offer of plaintiff evidenced an abandonment of, or lack of belief in, its existing contract. Plaintiff

explained that the purpose of this letter was to add the quantities of the larger pipe to its existing contract.

There is no merit in the contention of the defendant that the evidence raises alternate inferences (1) that the parties never entered into a contract because it was "preconditioned" on the financing of defendant, or (2) that the contract was "executory" and, therefore, subject to the continuing right of unilateral cancellation. Aside from the principle that the construction of a written contract is for the court, no such inferences could reasonably be drawn from the evidence. While financing and payment are always matters of consideration, there is no evidence that this contract was not fully and unconditionally consummated. The evidence indicates that when the contract was closed, both parties expected the financing to be effected imminently, and provided definite dates for early delivery without any thought of financial difficulties. Nothing was said in any of the letters which could possibly be construed to provide that financing was a condition precedent to the contract. In fact, the matter of financing was not mentioned in any of the letters or papers exchanged between the parties and forming the written integrated contract. Neither is there any evidence that the matter of making financing a condition precedent to a binding obligation was ever mentioned in any of the conferences leading up to the written contract. Defendant simply asserts that such was the general understanding, despite the fact there is no evidence, oral, or written, to support such assertion, and despite the fact that none of the papers constituting the written contract contained any reference whatever to financing. Instead, the written contract finally consummated on August 4, 1957, provided, unconditionally and in detail, for shipment of steel on specified dates, and the price to be paid therefor without any conditions. It was after August 4, 1957, when the parties talked and wrote about financing.

Defendant would gain solace from the evidence of Wehrle, wherein he stated that he had written a letter to Jones & Laughlin on September 24, 1957, stating that "At the present time delivery on this project depends on funds being made available." After the contract had been consummated on August 4, the plaintiff learned in September that defendant was having difficulty in securing its money, and defendant asked plaintiff to delay the delivery date from time to time until funds were available, and this was agreed to by plaintiff. On cross-examination, Wehrle made it clear more than once that "time for delivery was dependent on financing;" that "We were bound to them, committed to ship;" and "The time for delivery was dependent on completing financing, but we felt committed as a company to ship this pipe from April '57 until it was breached." Except for evidence of general custom mentioned hereafter, no other witness testified as to the intention of the parties relating to financing. The statements of Wehrle, asked on cross-examination concerning the intent of the parties as to financing, remain uncontradicted.

Some effort is made by defendant to show that by a general trade usage or custom this purchase order was on a "purely tentative, unilaterally, cancellable basis." The trouble with defendant's case here is that it was unable to show such custom or usage, at least with respect to contracts of this sort with brokers. Defendant's evidence relates primarily to custom among manufacturers. Indeed, one of defendant's officials testified that he regarded the original agreement prior to its amendment as creating an immediate binding obligation upon his company. The testimony also shows that the whole purpose of the contract was to demonstrate to financial institutions a firm guaranteed source of supply; a purported contract unilaterally cancellable by either party would have served no such purpose. The proof did not establish a custom or usage from which a trier-of-fact could find a condition precedent that each

party had a unilateral right of cancellation until financial arrangements were completed.

Defendant takes issue with the phase of the verdict which involves a deduction of $2,000.00 from the total discount of $125,493.88 (calculated at 5%) to cover additional expense which plaintiff would have incurred had the defendant performed the purchase contract. Wehrle testified that such expense would not have exceeded $2,000.00 to cover billing and all other expense incidental to the fulfilment of the contract. Such a figure could not have been demonstrated with mathematical certainty. The court deducted that amount, the only figure mentioned in the evidence from the total commissions.

Defendant also claims that the wrong discount or commission was used in figuring a part of the damages. It admits that in 1957 (when the steel was ordered), and on May 27, 1958 (when the contract was repudiated), and on September 15, 1958 (when this action was instituted), and up to January 1, 1959, plaintiff's discount was 5 per cent. It claims that on January 1, 1959, plaintiff's discount was reduced to 3 per cent; that the other companies delivered 58 per cent of the steel prior to January 1, 1959, and 42 per cent thereafter; and that the court should have accepted these delivery dates by other companies as the dates of delivery by plaintiff in fixing the amount of plaintiff's discount. In the directed verdict all damages were based upon the 5 per cent discount in effect at the time of breach without regard to when other companies were able to make deliveries.

In those cases where a time for performance is fixed by the contract, and a breach occurs before the date fixed for performance, this is called an anticipatory breach of contract. In that event the party aggrieved may sue immediately to recover full damages, and the weight of authority or the general rule, subject to some exceptions, is to the effect that damages are to be assessed on the

basis of profit factors existent at the time of performance fixed by the contract. The anticipatory repudiation does not cause the repudiated promise to be treated as if it were a promise to render performance at the date of repudiation. Repudiation does not accelerate the time fixed for performance, nor does it change the damages to be awarded as the equivalent of the promised performance. Restatement, Contracts, Sec. 338, comment (a).

The facts, as set out above, show that, at the time of the breach by defendant, the contract was one with an indefinite date of delivery. The law is clear as to the date on which damages are to be computed with respect to breach of contracts with indefinite delivery dates:

> "The time for delivery of goods under an executory contract of sale may be indefinite or not fixed, either by the terms of the contract or by the subsequent agreement of the parties, as where the time of delivery is extended indefinitely. In any case, where the time for delivery, for the reasons mentioned or for other reasons, is not at some fixed date, it is obvious that the measure of the seller's damages for breach of the contract by the buyer cannot be based upon the difference between the contract price and the market value at the time fixed for delivery. In the circumstances, the date for delivery will be assumed to be the time when the buyer definitely repudiates or renounces the contract, or wrongfully refuses to accept the goods, and the damages will be assessed at the difference between the contract price and the market value at the time of the breach and at the place of delivery. * * * The market value of the goods at the time the buyer refuses absolutely to receive them is determinative of the damages where the time for delivery is not fixed by the contract but is to be determined by the purchaser, since the refusal to receive the goods implies a refusal to fix a time for their delivery." 46 Am. Jur. Sales, § 618.

It is interesting to note that after the first cancellation letter of May 27, 1958, defendant explicitly refused to set a date for delivery as requested by plaintiff's letter of June 13, 1958. On June 18, 1958, defendant wrote plaintiff:

> "This will acknowledge receipt of your letter of June 13, 1958, requesting the date of delivery of our pipe requirements. We refer you to our letter of May 27, 1958, in which all of the remaining pipe on order with your company for the North Carolina Natural Gas Corporation was cancelled."

Defendant urges that if the date of performance (delivery) was uncertain at time of breach, but became certain at the time of trial, damages should be computed as of the time of performance. It then follows with the argument that at the time of trial of this case the date of delivery by these other companies was known, and that the court should accept their delivery dates as the date plaintiff would have delivered, in fixing the amount of plaintiff's discount. Accepting, but not deciding the legal principle advanced, there is no merit whatever in this contention. Irrespective of whether the contract in effect at time of breach provided a definite or indefinite date of performance, or whether the trial took place before or after defendant accepted deliveries from other suppliers, the case must be affirmed on the facts.

The contract originally provided definite dates for delivery for each size of pipe. All of the pipe, except distribution pipe, was to be delivered between November 1 and December 30, 1957, and the distribution pipe was to be delivered between November 1, 1957, and January 30, 1958. Prices were to be based on manufacturer's price as of date of shipment. Deliveries were indefinitely deferred at the request of defendant until defendant's money should become available. On May 27, 1958, the date of breach, and

on September 15, 1958, when this action was instituted, defendant's money had not then become available.

The written contract provided that the sale was f.o.b. at point of shipment and responsibility of plaintiff ceased upon delivery of property to carrier. The date of performance was, therefore, the date of shipment by McJunkin, not the date of shipment by some other dealer or manufacturer. If this contract had not been cancelled by defendant, when would McJunkin have made shipment in the normal course of events? Defendant seeks to hold McJunkin to the dates that other suppliers made shipments under other substituted contracts, and under different conditions in their plants.

Defendant received its money on October 15, 1958. The following appears in the testimony of Kyle, vice president of defendant company:

"Q. Now, when, in relation to that financing date, did your deliveries of steel pipe commence?

"A. It commenced within thirty to forty-five days after that date.

"Q. How fast did you take the pipe thereafter?

"A. As Mr. Ransom testified, we got 58 per cent of it in that year, 1958, in November and December.

"Q. WHAT WAS DETERMINING THE RATE AT WHICH YOU WOULD TAKE THE PIPE AT THAT TIME?

"A. THE AVAILABILITY OF PIPE AND THE ABILITY OF THE STEEL MILLS TO FURNISH IT.

"Q. Was the pipe being used in the propect as it was shipped?

"A. Yes; we let contracts. As soon as the financing was completed, we went right to work advertising for bidders on the pipeline. We had some forty bidders who presented bids within thirty days, and the pipe was coming in, and we awarded the contract to the

lowest bidder; and I might say we purchased all the pipe from the lowest bidder in order to protect our certificate. Work actually started on the project in December, 1958, construction work."

Plaintiff was never consulted about any of these delivery schedules. It had specifically asked defendant subsequent to date of breach to let it know when it could accept deliveries and defendant refused to set any such dates. Had defendant not cancelled its contract, it would not have been necessary for it to advertise for bidders of pipeline, or for the defendant to process forty bidders, and award contracts, causing a delay of 30 to 45 days. Notwithstanding this delay, 58 per cent of the pipe was furnished by these new suppliers under new contracts in a period of about six weeks. There had been much delay, defendant was most anxious to get started, it had its money and was ready to accept delivery. Defendant asserted that the only factor which determined the rate of delivery was the availability of pipe with those other mills, and the ability of these other steel mills (not Jones & Laughlin or McJunkin) to furnish it. Kyle, the only officer of defendant who testified, did not claim that delivery was in any way based upon its "construction progress," as defendant now asserts. Neither did defendant claim at trial that its money was not available, or that it was not ready to receive the steel on October 15, 1958.

At the time of the breach, and continuously until date of trial, the allocated steel was still included in the Jones & Laughlin production schedule, and Jones & Laughlin and McJunkin stood willing and ready to make delivery. Had defendant let McJunkin know about the progress in its financing, as it promised to do, there is no reason whatever shown in the record why McJunkin could not have made delivery on October 15, 1958, or, in any event, prior to January 1, 1959. Plaintiff was selling its bonds to insurance companies and distributed a prospectus which

stated that defendant entered into its bond purchase agreement on September 16, 1958, and also stated that as of that date, September 16, 1958, it had commitments for purchase of steel aggregating $4,455,873.

There is no evidence in the record to indicate that McJunkin could not have made shipment of this entire order in 1958 had it been given an opportunity to do so. The only evidence on this subject offered by defendant is the dates on which other companies made deliveries. If this evidence is even relevant or admissible, it is certainly of little, if any, value. There is considerable evidence, mentioned above, to indicate that McJunkin could have made shipment of the entire order in 1958. It agreed only to a delay until defendant's money would be available, later determined to be October 15, 1958. If the date of performance by plaintiff became definite before trial in 1960, and that date would have been during 1958, the discount rate would be 5 per cent, the same as it was at date of breach, and it is not necessary to decide which date is the proper date to measure damages.

If, however, there is no evidence in the record to show when McJunkin (not the other suppliers) would have made delivery f.o.b. at mill in the normal course of events, had the contract not been cancelled, then the date of performance would still remain indefinite at date of trial, and under all authority, where date of performance is still indefinite at date of trial, there can be no price set or no commission figured as of date of performance because there is no such date. In that event, all authorities say that the date of breach determines the amount of damages.

Under the most liberal interpretation of the evidence from defendant's point of view, the date of shipment of this steel under this contract by McJunkin, if the contract had not been cancelled, was indefinite at date of trial. Had a jury substituted the date of actual delivery by other dealers and other mills under different contracts and other

conditions for the dates that plaintiff would have shipped, and based its finding solely on that evidence (the only evidence to support such theory), such verdict would not stand. Consequently, under the evidence in this record, whether the date of performance was definite or indefinite at date of trial, the discount would be 5 per cent.

The measure of seller's damages is such as may reasonably be said to have been in the mutual contemplation of the parties at the time of the execution of the contract. This is the guiding principle, and to secure this result different rules of measurement of damages are resorted to as the peculiar circumstances of the particular case may require in order that all indemnity, and no more, may be awarded for the breach. 44 A.L.R. 217. The record shows that 5 per cent discount was at all times contemplated, notwithstanding any change in the price of steel. It was contemplated that the price of steel might change, and provision was made for that factor, but it was never contemplated that the commission would be reduced to 3 per cent.

It was no fault of McJunkin that the exact date McJunkin would have shipped is indefinite. It was not given an opportunity to ship on October 15, 1958, when defendant's money became available. Instead of accepting steel from McJunkin when its money was available, defendant began to advertise for new suppliers, causing the additional delay of 30 to 40 days in processing 40 bids and entering into new contracts. The record is clear that this was done with full knowledge on the part of defendant that it would be required to pay the 5 per cent commission to McJunkin, but would be able to eliminate the existing escalator clause in the McJunkin contract as to manufacturer's cost, and also have a rebate of 4 per cent of the prevailing 5 per cent commission. It was a calculated risk after advice from counsel, and there is good reason to believe that on May 28, 1958, when the cancellation letter was written, that defendant firmly believed that it would save more than the 5 per cent commission which was due plaintiff. And there

is reason to believe that it did actually save as much, if not more, than the commissions due McJunkin. All the authorities are in accord in saying that the courts seek to place the party wronged, as nearly as can be done, in the same situation with respect to the contract as its performance would have placed him. See 44 A.L.R. 217, where it is stated:

> "while there are certain general principles according to which the damages to the seller are to be estimated, yet there is, nevertheless, a considerable degree of elasticity in their application. In a sense, each case is sui generis; hence, it is necessary to look to the facts to determine what particular rule for the assessment of damages will be just to the parties."

Furthermore, there was no reduction in the functional discount. Effective January 1, 1959, the steel mills announced a "new plan of distribution," by which distributors, such as McJunkin, became agents of the mills on a commission basis and were no longer merchants buying and reselling on their own account. On January 1, 1959, the distributor's profit margin was changed from a 5 per cent functional discount to a 3 per cent agency commission. This was, no doubt, due to the fact that under the agency arrangement the risk of collection were no longer with the distributor but were carried by the mills. This new plan did not become effective until more than 7 months after repudiation by defendant, after which plaintiff was never given the opportunity to agree with defendant as to date of performance, which it had the right to do. As between plaintiff and defendant, plaintiff is entitled to 5 per cent when it comes to figuring its damages.

There is not sufficient evidence to support a finding of a 3 per cent commission under any rule of damages. The amount claimed and allowed by the District Court was based upon a commission of 5 per cent on the old price of steel in effect on May 28, 1958 (date of breach), and not

on the increased price of steel which went into effect on August 4, 1958. There being no evidence to support a 3 per cent commission, and the court having calculated the commission on the lower price of steel, there is no merit in this assignment of error. Since we decided this question of amount of discount on the basis of insufficiency of evidence, it is not necessary to decide what measure of damages rule is applicable, or whether the law of North Carolina or West Virginia applies.

Affirmed.

Order on Rehearing

Filed and Entered March 19, 1962.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8208.

McJUNKIN CORPORATION, *Appellee,*

vs.

NORTH CAROLINA NATURAL GAS CORPORATION, *Appellant.*

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh.

ORDER ON REHEARING

THIS CAUSE came on to be heard on the rehearing heretofore granted, and on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion filed in this cause on June 12, 1961, be, and it is hereby, withdrawn, and the

opinion this day filed is substituted therefor; and that the judgment of the said District Court appealed from, in this cause, be, and the same now is, on rehearing, affirmed with costs. Let mandate issue forthwith.

CLEMENT F. HAYNSWORTH, JR.
United States Circuit Judge.

HERBERT S. BOREMAN
United States Circuit Judge.

HARRY E. WATKINS
United States District Judge.

FILED
MAR 19 1962
R. M. F. WILLIAMS, JR.
CLERK

APPENDIX B

[The following extract from the original opinion of the Court of Appeals dated June 12, 1961, was deleted from the opinion on rehearing dated March 19, 1962. It was replaced by the portion of the opinion on rehearing commencing with the second paragraph on page 12a, *supra*. The preceding portions of the two opinions are identical.]

On May 27, 1958, when the contract was repudiated, and on September 15, 1958, when this action was instituted, the discount was 5 per cent. The discount was changed to 3 per cent on January 1, 1959. In the directed verdict, damages were based upon the discount in effect at time of breach of contract, whereas defendant claims that damages should be based upon the discount in effect at the time defendant accepted deliveries from other companies.

The facts, as set out above, show that, at the time of the anticipatory breach by defendant, the contract was one with an indefinite date of delivery. The law is clear as to

the date on which damages are to be computed with respect to anticipatory breach of contracts with indefinite delivery dates:

> "The time for delivery of goods under an executory contract of sale may be indefinite or not fixed, either by the terms of the contract or by the subsequent agreement of the parties, as where the time of delivery is extended indefinitely. In any case, where the time for delivery, for the reasons mentioned, or for other reasons, is not at some fixed date, it is obvious that the measure of the seller's damages for breach of the contract by the buyer cannot be based upon the difference between the contract price and the market value at the time fixed for delivery. In the circumstances, the date for delivery will be assumed to be the time when the buyer definitely repudiates or renounces the contract, or wrongfully refuses to accept the goods, and the damages will be assessed at the difference between the contract price and the market value at the time of the breach and at the place of delivery. * * * The market value of the goods at the time the buyer refuses absolutely to receive them is determinative of the damages where the time for delivery is not fixed by the contract but is to be determined by the purchaser, since the refusal to receive the goods implies a refusal to fix a time for their delivery." 46 Am. Jur. Sales, § 618.

It is interesting to note that after the first cancellation letter of May 27, 1958, defendant explicitly refused to set a date for delivery as requested by plaintiff's letter of June 13, 1958. On June 18, 1958, defendant wrote plaintiff:

> "This will acknowledge receipt of your letter of June 13, 1958, requesting the date of delivery of our pipe requirements. We refer you to our letter of May 27, 1958, in which all of the remaining pipe on order with your company for the North Carolina Natural Gas Corporation was cancelled."

Defendant urges that the factual situation in this case would make the law pertaining to contracts with definite delivery dates applicable. Even if this were true, the result in this case would not be changed. In the leading case of Roehm v. Horst, 178 U.S. 1, cited more than any other case on this subject, the buyer (Roehm) repudiated the contracts prior to the date of delivery. The goods to be delivered (hops) were not in being at the time of the repudiation. The plaintiff, Horst, promised to supply the hops, but had to purchase them from others. The sales contracts provided definite dates for delivery. The court held that when Roehm repudiated the contracts prior to time for delivery, Horst had two alternatives: (1) Treat the contract as continuing and compute damages as of date of performance; (2) Elect to treat the contract as terminated and sue immediately. Horst did the latter. On the question of damages for anticipatory breach, the Supreme Court stated:

> "If a vendor is to manufacture goods, and during the process of manufacture the contract is repudiated, he is not bound to complete the manufacture, and estimate his damages by the difference between the market price and the contract price, but the measure of damage is the difference between the contract price and the cost of performance. (cases cited) Even if in such cases the manufacturer actually obtains his profits before the time fixed for performance, and recovers on a basis of cost which might have been increased or diminished by subsequent events, the party who broke the contract before the time for complete performance cannot complain, for he took the risk involved in such anticipation. If the vendor has to buy instead of to manufacture, the same principle prevails, and he may show what was the value of the contract by showing for what price he could have made subcontracts, just as the cost of manufacture in the case of a manufacturer may be shown. Although

he may receive his money earlier in this way, and may gain, or lose, by the estimation of his damage in advance of the time for performance, still, as we have seen, he has the right to accept the situation tendered him, and the other party cannot complain."

See also Vogt Bros. Mfg. Co. v. Sloss-Sheffield Steel & I. Co. 6 Cir., 297 Fed. 54; Donati v. Cleveland Grain Co., 4 Cir., 221 Fed. 168.

There are some cases holding that where the delivery date is definite that date should be used to compute damages. Part of the confusion prevalent in the rule as to anticipatory breach of contracts with definite delivery dates arises from the fact that many courts have failed to recognize the difference between anticipatory breach (1) when the goods are in being, and (2) when they are not yet manufactured or are in the process of manufacture.

1. Goods in being at the time of the breach—these are the cases in which same courts hold that the damages are the difference between the contract price and the market value at the date of delivery. This was not the situation in either Roehm v. Horst, supra, or the present case.

2. Where breach occurs prior to completion of manufacture or production—here the cases hold that damages would be computed as of the date of the breach.

The Roehm case holds that where the vendor is also a vendee, as here, upon an anticipatory breach by the purchaser, the vendor's damages are the difference between the contract price and the price for which he could have purchased (here contract price, less 5 per cent). Thus, even if this contract be considered one with a definite date of delivery, under the Roehm case, the damages would be computed as of the date of the breach.

Affirmed.

LIBRARY
SUPREME COURT, U. S.

Office Supreme Court, U.S.
FILED
AUG 14 1962
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 260

NORTH CAROLINA NATURAL GAS CORPORATION,
Petitioner,

v.

McJUNKIN CORPORATION, *Respondent.*

BRIEF FOR McJUNKIN CORPORATION, RESPONDENT, IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

JOHN H. ANDERSON,
WILLIS SMITH, JR.,
North Carolina Bank Bldg.,
Raleigh, North Carolina.

ARTHUR G. STONE,
DONALD O. BLAIG,
Nelson Building,
Charleston 25, West Virginia,
Attorneys for Respondent.

August 14, 1962

JARRETT PRINTING COMPANY, CHARLESTON, W. VA.

INDEX

	Page
INTRODUCTION	1
QUESTIONS AS PRESENTED BY PETITION	2
ANSWER TO POINT I OF THE PETITION	2
ANSWER TO POINT II OF THE PETITION	6
CONCLUSION	12

CITATIONS

Cases:

Allen v. *Matson Navigation* (C.A.-9, 1958) 255 F. (2d) 273 ---- 11

Booker v. *Coal Corp.*, 90 W. Va. 642, 112 S. E. 237 ---- 7

Bryant v. *Southern Box & Lumber Co.*, 192 N. C. 607, 135 S. E. 531 ---- 5

Colerider v. *Central Nat'l Bank*, 125 W. Va. 760, 25 S. E. (2d) 900 ---- 8

Davis Frozen Foods, Inc. v. *Norfolk & Southern R. Co.*, (C.A.-4, 1953) 204 F. (2d) 839; certiorari denied 346 U. S. 824, 74 S. Ct. 41, 98 L. Ed. 349 ---- 10

Delaware etc. R. Co. v. *Converse*, 139 U. S. 469, 35 L. Ed. 213 ---- 7

Diederich v. *American News Co.*, (C.A.-10, 1942), 128 F. (2d) 144 ---- 11

Erie R. Co. v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188 ---- 11

Ettelson v. *Metropolitan Life Ins. Co.* (C.A.-3, 1943) 137 F. (2d) 62 ---- 11

Hartman v. *Hotel Co.*, 136 W. Va. 681, 68 S. E. (2d) 34 8

Herron v. Southern Pacific R. Co., 283 U. S. 91, 75 L. Ed. 857 11

Leach v. Burr, 188 U. S. 510, 47 L. Ed. 567 7

Ling v. Edenfield, (C.A.-5, 1954) 211 F. (2d) 705 11

McCall v. Gloucester Lumber Co., 196 N. C. 597, 146 S. E. 579 5

McSweeney v. Prudential Ins. Co., (C.C.A.-4, 1942) 128 F. (2d) 660; certiorari denied 317 U. S. 658 11

Robbins v. Myers Trading Post, 253 N. C. 474, 117 S. E. (2d) 8

Union Pac. R. C. v. McDonald, 152 U. S. 262, 38 L. Ed. 434 7

Wood & Brooks Lumber Co. v. Hewit Lumber Co., 89 W. Va. 254, 265, 109 S. E. 242, 19 A.L.R. 467 4

Young v. Southern Mica Co., 237 N. C. 644, 75 S.E. (2d) 795 8

Other Authorities

46 Am. Jur. "Sales", Sec. 618 4

Decennial Digests *"Contracts"* Key No. 176 8

Uniform Sales Act, Sec. 64(3) 4

Wigmore on Evidence, (3d. ed.) Sec. 2495(b) 7

IN THE

Supreme Court of the United States

October Term, 1962

No. 260

NORTH CAROLINA NATURAL GAS CORPORATION,
Petitioner,

v.

McJUNKIN CORPORATION, *Respondent.*

BRIEF FOR McJUNKIN CORPORATION, RESPONDENT, IN OPPOSITION TO THE GRANTING OF A WRIT OF CERTIORARI

INTRODUCTION

On September 15, 1958, McJunkin Corporation, a West Virginia corporation, instituted this action in the United States District Court for the Eastern District of North Carolina, its jurisdiction being invoked on the ground of diversity of citizenship. In October, 1960, the case was tried before Senior District Judge Albert L. Reeves of the Eighth Circuit. The claim was for breach by the Gas Corporation, petitioner herein, of a contract for the purchase of a large quantity of steel pipe. Three questions were involved:

(1) Was there a valid contract of sale?

(2) Was there an unjustified breach by the defendant?

(3) If so, what measure of damages applied?

The trial court answered the first two questions in the affirmative, the defendant having repudiated the purchase

contract without taking any of the pipe, and directed a verdict for the plaintiff in an amount equal to the distributor's profit in the form of a "functional discount" which the plaintiff would have received had petitioner taken and paid for the pipe as agreed.

On appeal the Court of Appeals (Fourth Circuit) affirmed. But on petition of petitioner for a rehearing as to the measure of damages, the Court allowed a rehearing as to that issue. This rehearing resulted in a reaffirmance of the judgment on March 19, 1962.

Questions as Presented by Petition

The present petition for writ of certiorari was filed on July 17, 1962. It states two questions as grounds for review:

(1) May a federal court in a diversity action measure damages for an anticipatory breach of contract without regard to the state law with respect thereto?

(2) May a federal court in directing a verdict in favor of the party having the burden of proof decline to view the evidence in the light most favorable to the opposite party, and thereby deprive such party of a jury trial?

ANSWER TO POINT I OF THE PETITION

Point I of the petition charges that the Court of Appeals decided the question of the measure of the plaintiff's damages without regard to the substantive law of North Carolina; this notwithstanding that:

(1) The measure of Plaintiff's damage, (loss of "functional discount") as found by the District Court and approved by the Court of Appeals, was the only measure of damage supported by competent and relevant testimony.

(2) The measure of plaintiff's damage (loss of "functional discount"), as the Court of Appeals so clearly found, was the same whether determined as of the date of the purchase contract, the date of the breach by petitioner,

or as of the date plaintiff would have made deliveries had it been permitted to do so promptly after petitioner was in position to receive and pay for the pipe contracted for; and

(3) The Court was advised in the briefs as to the Court decisions in North Carolina, and elsewhere, that the measure of damage for the anticipatory breach of a purchase contract, where the time for performance has been postponed indefinitely or is otherwise not fixed, is determined as of the date of the breach; and

(4) There is no showing, and there can be no showing, that the decision of the Court was in conflict with the law of North Carolina or of any other state.

The gist of petitioner's contentions below as to the measure of damages arose out of the fact that effective January 1, 1959, more than seven months after its repudiation of the contract, the basis of compensation to McJunkin was changed by the steel mills from a 5 per cent profit as a distributor on the sales price to a 3 per cent commission as sales agent for the mills, under which plan of course the selling agent was relieved of responsibility for collections. At the date of repudiation by petitioner, (May 27, 1958) the time for delivery scheduled in the original sale agreement had been postponed by mutual consent, and a new delivery date had not yet been agreed upon. Petitioner advanced various views as to the measure of McJunkin's damage, but in the Court of Appeals finally settled upon the contention that the 5 per cent figure should be applied to the pipe delivered to it (by other suppliers) prior to January 1, 1959, and 3 per cent to the pipe delivered after that date. McJunkin had no voice in determining the time when petitioner actually took deliveries from other sellers after the breach. Moreover, as the Court of Appeals pointed out, the delay in deliveries until after January 1, 1959, was due to the time involved in advertising for new suppliers and in processing new purchase contracts with them. (Opinion 18a.) For these and other reasons stated

in the opinion of the Court of Appeals, the evidence of a change from a discount of 5 per cent to a commission of 3 per cent was wholly irrelevant.

Under these circumstances the Court of Appeals correctly said: "There is not sufficient evidence to support a finding of a 3 per cent commission *under any rule of damages.*" (Italics herein supplied unless otherwise stated.) The Court therefore further said:

> "Since we decided this question of amount of discount on the basis of insufficiency of evidence, it is not necessary to decide what measure of damages rule is applicable, or whether the law of North Carolina or West Virginia applies."

Moreover, in cases like the present, that is, cases involving repudiation of a purchase contract at a time when the date of performance has not been fixed, the highest courts of both West Virginia and North Carolina specifically approve and follow the rule, from which there appears to be no dissent in any jurisdiction, that damages will be determined as of the date of the breach.[1] *E. g. 46 Am. Jur. "Sales"* Sec. 618; *Uniform Sales Act*, Sec. 64(3).

In *Wood & Brooks Lumber Co.* v. *Hewit Lumber Co.*, 89 W. Va. 254, 265, 109 S. E. 242, 19 A.L.R. 467, the Supreme Court of Appeals of West Virginia said:

> "The general statement of the law in regard to damages in cases of this character, as recently set forth by this court, is as follows: 'For breach of contract for the sale of personalty, by non-delivery of the property, the measure of damages ordinarily is the difference between the contract price and the market value of the articles at the time and place specified for delivery.' *Wilson* v. *Wiggin*, 77 W. Va. 1, 87 S. E. 92; and where no specific time is

[1] The Court of Appeals was fully informed of the supporting authorities, including the North Carolina decisions, which petitioner now says should be controlling.

> fixed for delivery the market value will be estimated as of the time of the refusal to deliver. Sutherland, Damages (4th Ed.) Sec. 651; 5 Elliot, Contracts, Sec. 5108; *Guice* v. *Crenshaw*, 60 Tex. 344; *Summers* v. *Hibbard*, 153 Ill. 102, 111, 46 A.S.R. 872; and the same rule applies where delivery is postponed from time to time, Sedgwick, Damages (9th Ed.) Sec. 737; *Roberts* v. *Benjamin*, 124 U. S. 64."

Similarly, in *McCall* v. *Gloucester Lumber Co.*, 196 N. C. 597, 146 S. E. 579, the North Carolina court used the following language:

> "The contract fixed no time for performance or price as to the merchantable saw timber and the price of the acid wood and tan bark was subject, under the contract, to *fluctuation*. The standard of adjustment is the fair market value at the time of the breach. The railroad was fixed in the contract as the place of delivery. The measure of damages is the difference between the fair market value of the wood product delivered according to the terms of the contract and the fair market value of the property in its then condition at the time of the breach."

Accord: *Bryant* v. *Southern Box & Lumber Co.*, 192 N. C. 607, 135 S. E. 531.

None of the authorities cited by petitioner (p. 12) are opposed to the foregoing,[2] and it is believed that no contrary decision will be found in North Carolina, West Virginia or elsewhere.

The petition therefore falls far short of compliance with the requirement of Rule 19 of this Court, indicating the

---

[2] McJunkin Corporation has never contested and the Court of Appeals specifically recognized (Opinion p. 13a) the authorities cited by petitioner which support the rule that *where parties to a purchase contract have fixed the date of performance*, damages for breach will be determined as of that date.

character of the reasons to be considered on application for certiorari:

> "(b) Where a court of appeals has * * * decided an important state or territorial question in a way in conflict with applicable state or territorial law."

ANSWER TO POINT II OF THE PETITION

The second point in the petition is a charge that in directing the verdict the Court declined to view the evidence in the light most favorable to petitioner, and that by "formulating its own rules" and "making no mention" of the North Carolina law it deprived petitioner of a jury trial.

In amplification of this contention petitioner speaks of "highly contested issues of fact," evidence of "different inferences and conclusions," and the impropriety of a directed verdict in favor of the party having the burden of proving such "determinative issues."

As aptly found by the Court of Appeals, the basic answers to these contentions are:

(1) Petitioner had agreed to purchase pipe from the plaintiff under an unambiguous, complete and admittedly genuine written contract. The interpretation of such a contract and the measurement of petitioner's responsibility thereunder being for the court not a jury to determine, the direction of the verdict was not an improper denial of the right to trial by jury under any state or federal law; and

(2) Tested either by federal or state law, the so-called "issues of fact" and "inferences and conclusions" suggested in the petition involved matters inadmissible and irrelevant to the interpretation and enforcement of the written contract sued on; and

(3) Independently of and in addition to (1) and (2), the question of directing a verdict in a federal court is one

of federal not state procedure, and the Court is not governed by any state law or state court decision with respect thereto.

It is the settled rule of the federal, as well as that of most state, courts[1] that in cases where the facts overwhelmingly and unerringly point to but one maintainable result, a directed verdict is not an invasion either of the province of the jury or the fundamental rights of the litigant.

In its brief in the Court of Appeals petitioner conceded this principle as follows:

> "While under proper circumstances a federal judge may, under Rule 50, direct a verdict in favor of the party having the burden of proof, the test of the propriety of such action is different from that when the party not having the burden makes the motion. To meet the test of propriety in directing verdict in favor of the party having the burden a judge must be able to say correctly not only that there was sufficient evidence to support a verdict as directed, but that there was insufficient evidence for permitting any different verdict."

There is no need, however, to encumber the present case with excursions into the general field suggested by the authorities.

The determinative factor in this action is that the plaintiff's case rested upon a clear and complete set of written documents, the genuineness of which was stipulated at the inception of the trial. The controlling, and only real, issue was whether the writings so relied upon constituted a contract binding upon the parties.

---

[1] This includes the right to direct a verdict for the plaintiff as well as the defendant. *Davis Frozen Foods, Inc.* v. *Norfolk & Southern R. Co.* (C.A.-4, 1953) 204 F. (2d) 839; *Leach* v. *Burr*, 188 U. S. 510, 47 L. Ed. 567; *Union Pac. R. C.* v. *McDonald*, 152 U. S. 262, 38 L. Ed. 434; *Delaware etc. R. Co.* v. *Converse*, 139 U. S. 469, 35 L. Ed. 213; *Booker* v. *Coal Corp.*, 90 W. Va. 652, 112 S. E. 237; and cases cited and quoted *Wigmore, On Evidence* (3d. ed.) Sec. 2495(b).

On this point the Court of Appeals, as did the District Court, found that the purchase order and other written documents created "a binding and subsisting contract between the parties, not ambiguous, conditional or indefinite in any manner, and binding on the defendant to purchase and the plaintiff to furnish" the pipe contracted for. (Opinion 5a-6a.)

The factors which controlled this determination, namely, the interpretation of the writings involved, and the consequences which flow therefrom were for the court, not for the jury, to consider and pass upon. This, it is believed, is not only the rule in North Carolina and West Virginia but in all jurisdictions, state and federal.[1] The so-called factual inferences and other parol matters on which it is contended the plaintiff carried the burden of proof and which petitioner insists should therefore have been submitted to the jury were either contradictory of the plain and unambiguous writings or entirely irrelevant thereto. (Opinion 10a-11a.)[2]

Moreover, Mr. Kyle, the executive of petitioner who had complete charge of the transaction, put the real "decisive determination," beyond the realm of dispute when he testified:

---

[1] "Where language of a contract is free from ambiguity, the ascertainment of its meaning and effect is for the court, and not for the jury." *Young v. Southern Mica Co.*, 237 N. C. 644, 75 S. E. (2d) 795. "The construction of an unambiguous written agreement, or a series of such agreements read together, is a matter of law for the court; and oral testimony of parties thereto, or others, as to what was intended thereby, will not be considered." *Coleridge v. Central Nat'l Bank*, 125 W. Va. 760, 25 S. E. (2d) 900. Many similar federal and state cases cited in Decennial Digest "*Contracts*," Key No. 176, including *Robbins v. Myers Trading Post*, 253 N. C. 474, 117 S. E. (2d) 438.

[2] For example, the supposed (but unproven) "contemplation" of the parties that the contract was not to be considered binding until petitioner's financing was "secure," as well as the alleged (also unproven) trade usages and customs, which were in clear opposition to the plain written commitments of the parties, and as such wholly inadmissible. *Hartmann v. Hotel Co.*, 136 W. Va. 681, 68 S. E. (2d) 34.

"Q. When you received the letter from Mr. Wehrle of August 5, and from that time on, you knew that McJunkin Corporation had committed itself to furnish your company the pipe referred to in your letter of July 11, upon the terms of your letter of July 11?

"A. Yes."

This unqualified recognition of the binding effect of the purchase contract doubtless accounts in large measure for petitioner's attempt to becloud the case with the various unproven and inadmissible matters above indicated. These attempts have been most recently carried forward in the petition to this Court.

As to the fact of the breach, defendant's conduct was undenied and undeniable. On May 27, 1958, petitioner addressed McJunkin Corporation as follows:

"This letter will constitute cancellation of the line pipe ordered from you in our letter of July 11, 1957."

There was no suggestion then of "conditions," "understandings," "trade usages" or any of the other considerations subsequently conceived and urged; nor was there any intimation that petitioner was not bound by its purchase order. One does not cancel that which does not exist. The Court of Appeals pertinently concluded that petitioner elected summarily to "cancel" its whole commitment and risk the consequences.

The third and only remaining issue, the determination of the measure of plaintiff's damage, was inherently a matter for the Court not the jury to decide.

Since, as above developed, the law is settled in North Carolina, West Virginia and perhaps all other states, that the jury had no proper function to perform with respect to the interpretation or application of the written contract sued on, the contention that the Court found in favor of the

plaintiff on the basis of "its own rules," without reference to the law of North Carolina, has no tenable significance.

Moreover, upon principle and according to the majority of the federal courts, both before and since Rule 50 of the Rules of Civil Procedure, the matter of directing a verdict is generally considered to be procedural and is therefore controlled by federal practice rather than by substantive law of the states.

This principle, applied specifically to a directed verdict for the plaintiff, was dealt with in an opinion by Judge Parker as follows:

> "Defendant argues that verdict should not have been directed for plaintiff on this issue because the burden rested upon the plaintiff to establish defendant's negligence. This question was decided on the former appeal, where we said: 'The fact that the burden of this issue rested upon the plaintiff is immaterial; for the rule is well settled that the court, upon request should direct a verdict in favor of the party having the burden of proof if the evidence establishes the facts in his favor so clearly that reasonable men could entertain no doubt with regard thereto. (Citing cases.)' (195 F. 2d 605) Defendant argues that the state rule is to the contrary; but, that the question is one of federal and not of state practice, is too well settled to admit of argument, and this was true even in the days of the Conformity Act. See Nudd v. Burrows, 91 U. S. 426, 442, 23 L. Ed. 286; Capital Traction Co. v. Hof, 174 U. S. 1, 13-14, 19 S. Ct. 580, 43 L. Ed. 873; Herron v. Southern Pac. R. Co., 283 U. S. 91, 94, 51 S. Ct. 383, 75 L. Ed. 857."
>
> *Davis Frozen Foods, Inc.* v. *Norfolk & Southern Ry. Co.*, (C.A.-4, 1953) 204 F. (2d) 839; certiorari denied 346 U. S. 824, 74 S. Ct. 41, 98 L. Ed. 349.

Judge Parker's language above quoted states the holding in numerous prior and subsequent cases of the Fourth and other circuits.* Succinctly stated, the rule is that "the principle of *Erie R. Co.* v. *Tompkins* does not determine the division of functions between court and jury." *Diederich* v. *American News Co.*, cited below.

The reasoning behind the rule is declared in the opinion of Chief Justice Hughes in *Herron* v. *Southern Pacific R. Co.*, 283 U. S. 91, 75 L. Ed. 857. Holding that the laws of Arizona did not control the authority of a federal court in that state in directing a verdict, the opinion lays it down that

> "In a trial by jury in a Federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides. As was said by Mr. Justice Story, in United States v. Battiste (C.C.) 2 Sumn. 240, 243, Fed. Cas. No. 14,545: 'It is the duty of the court to instruct the jury as to the law, and it is the duty of the jury to follow the law, as it is laid down by the court'."
>
> *Idem. 283 U. S. at page 95.*

In stating its point, petitioner implies that by directing the verdict, the Court "deprived" it of a jury trial; that the action of the Court "reached the outer limits" of judicial power and "comes closest to infringement upon the Seventh Amendment's guarantee of jury trial rights in civil cases."

---

*McSweeney v. Prudential Ins. Co. (C.C.A.-4, 1942) 128 F. (2d) 660, certiorari denied 317 U. S. 658; Ling v. Edenfield (C.A.-5, 1954) 211 F. (2d) 705; Allen v. Matson Navigation (C.A.-9, 1958) 255 F. (2d) 273; Diederich v. American News Co. (C.A.-10, 1942) 128 F. (2d) 144; Ettelson v. Metropolitan Life Ins. Co., (C.A.-3, 1943) 137 F. (2d) 62, certiorari denied 320 U. S. 778.

The reasons for these challenging but nevertheless indecisive expressions are manifest. The author could not say, and obviously knew that he could not say, that on this record the directed verdict was a violation of any right "preserved" to petitioner by the Seventh Amendment. There is much literature on the subject, including studies of the rights to a jury trial in civil cases at common law. But it is much too late to assert that the Constitution "preserves" to a litigant the right to demand a jury trial as to the intendment and effect of a clear and admittedly genuine written contract, or even in other cases where the evidence overwhelmingly points in but one direction.

CONCLUSION

It is rare that a litigant complains that an opinion, particularly an adverse opinion, is too long. More often the complaint is that the Court has failed plainly and fully to explain its ruling.

In this case the Court of Appeals, after writing one adequate opinion, extended to petitioner the opportunity of an additional hearing on the question of damages. Doubtless the actual grievance of petitioner is that the opinion clearly illuminates the fact that the real rights and equities involved in this lawsuit are far afield from the supposed deprivation of rights so vigorously pressed upon the Court in the petition.

The basic and undeniable facts are that at a time (early 1957) when pipe was in very short supply, petitioner, through a consulting engineer who had enjoyed favorable business relationships with McJunkin Corporation, succeeded in negotiating a binding commitment by that company to supply petitioner its complete requirements. The then president of petitioner and its consulting engineer considered that such a commitment by a supplier was needed to effect its financing arrangements. At that time, it was anticipated that petitioner's construction project

would "go forward rapidly," with work to start "in the fall of 1957." Consequently, the contract scheduled deliveries for the period November, 1957, through January, 1958.

Having exhausted its quota of pipe by its commitment to petitioner, McJunkin Corporation lost the opportunity to market the pipe to other purchasers.

Because of the unexpected delays in obtaining approval of its project plans and consequent delays in effecting its financing, petitioner was forced to ask for successive postponements in the delivery schedule. This was agreed to by McJunkin Corporation, with the result that after October, 1957, the date for such deliveries was indefinite.

On May 27, 1958, after pipe in all sizes had become readily available, petitioner, with no word of explanation, notified McJunkin of its cancellation of the contract. Subsequently, petitioner bought the pipe from other suppliers, including foreign mills, at reduced prices. With something less than complete candor, Mr. Kyle, vice-president of petitioner, testified that while the lower prices may have been "one of the motives," petitioner's "prime motive" was to "clear our books."

It was in this background that the Court of Appeals concluded that petitioner's conduct in cancelling the contract was a "calculated risk."

The McJunkin Corporation seeks by this action to recover only the profit contemplated by the parties by a clear and complete written contract. On the basis of that contract, and the arbitrary repudiation thereof by petitioner, an eminent trial judge of long and varied experience and the Court of Appeals affirmed the validity of the complainant's claim.

The case is of importance to the litigants only. The decision conflicts with no state or other Court of Appeals decision, and the petition presents no important question of federal law which requires settlement by this Court. Most

certainly the decision does not depart from the accepted and usual course of judicial proceedings. To the contrary, as carefully developed in the written opinion, the judgment rendered comports with the highest standards of procedure and concepts of justice.

It is respectfully submitted that the writ of certiorari therefore should be denied.

JOHN H. ANDERSON,
WILLIS SMITH, JR.,
Raleigh, North Carolina.
ARTHUR G. STONE,
DONALD O. BLAGG,
Charleston 25, West Virginia,
Attorneys for Respondent.

August 14, 1962